

THE USES OF LITIGATION: THE RIGHT OF RETARDED CITIZENS TO A FREE PUBLIC EDUCATION

Thomas K. Gilhool, J.D.

On January 7, 1971, twelve retarded children, suing by their parents, went to federal court in Pennsylvania to claim their equal right to a free, public education. They went with the Pennsylvania Association for Retarded Children, suing for themselves and for all retarded children in Pennsylvania who were being denied access to schooling. They took with them as defendants the Commonwealth of Pennsylvania, the Secretary of Education, the State Board of Education, the Secretary of Public Welfare, twelve named school districts and all of the school districts in the Commonwealth. Thus began the present line of litigation by retarded citizens, now busting out all over.

In turning to the courts, these children and the Pennsylvania Association placed themselves in a very old American tradition—the use of the courts to secure social change (or, from the perspective of the citizen, to secure justice). That tradition dates back at least to 1904 and the founding of the National Association for the Advancement of Colored People when W.E.B. DuBois and the others determined that a significant element of their strategy would be a planned, self-conscious resort to the courts. The effort culminated, decades and many cases later, in

Brown v. Board of Education.⁴

In the years since *Brown*, in the late fifties and early sixties, we are familiar with the use of the courts by the civil rights movement. In the mid-sixties, as lawyers became in some number available to the poor, welfare recipients and public housing tenants, poor consumers turned to the courts to alter their situation. In the late sixties, women have begun again to go to court. That is the tradition in which twelve retarded

Pennsylvanians have now placed retarded citizens generally and their families. That is the tradition upon which we are building.

The black, the poor, women, the retarded and their families are knit together in this tradition not merely by historical accident, but by social fact. These citizens share common experience, and a perspective, and their resort to the courts is in significant part a result of the similar position each of them occupies in society.

Society's response to these persons is grounded in the judgment, so very widely exercised in the society, that "*they* are inferior, and *we* are superior." The judgment results in the attribution of stigma to these citizens,⁵ and is acted out in pervasive patterns of discrimination—a failure to hear, to heed or to act upon their claims. Carried to its conclusion the judgment has resulted in institutionalization or its functional equivalent for these citizens. In addition, the person subject to the judgment—"you are inferior"—comes to believe it, and to internalize it, from which flows feelings of guilt and shame, timidity in action and unusual, self-denying acquiescence to authority.

There is a jurisprudence which takes account of these social facts and which gives expression to the tradition we are speaking of. Perhaps its most famous statement is in footnote 4 of *United States v. Carolene Products*, where Chief Justice Stone suggested that

*"prejudice against discrete and insular minorities may be a special condition which tends seriously to curtail the political processes ordinarily to be relied upon and which therefore may call for a correspondingly more searching judicial inquiry."*⁶

It is in this tradition that the Pennsylvanians turned to litigation and the courts.

There are at least four uses of litigation and as we proceed through the Pennsylvania case you will, I hope, see each of them. First, litigation may be used to achieve certain substantive objectives: in this case, access to schooling for all retarded children: what has come to be called "zero-reject education." Second, litigation may be used to create new forums, forums in addition to the court in which citizens may assert and enforce rights or even define and establish new rights: in this case, the due process hearing. Third, litigation may be used to raise new questions for public discourse or to raise old questions to new visibility or perhaps to redefine questions and to get the facts out front. And fourth, litigation—like any petition of the government for redress of grievances—may be used by citizens to act out, to express themselves, perhaps even to redefine their notions of themselves.

The substantive objective of the Pennsylvania suit was zero reject education. The claim to a right to education for all retarded children rested upon two rather straightforward notions—one legal, the other factual.

The legal argument rested on *Brown v. Board of Education*. In that case, holding segregated schooling unconstitutional, a unanimous Supreme Court wrote as follows:

*"[Education] is required in the performance of our most basic public responsibilities. . . . It is the very foundation of good citizenship. It is a principal instrument for awakening the child to cultural values, in preparing him for later... training, and in helping him to adjust normally to his environment. It is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. The opportunity of any education, where the State has undertaken to provide it, is a right which must be made available to all on equal terms."*⁷

If "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education" then surely it is certain that the retarded child, denied the opportunity of an education, will not succeed. For the ordinary child may learn, willy-nilly, wandering in the world, on the street, looking at television, riding the bus. But the retarded child, if he is to learn, requires a formal, structured program of education and training. And the retarded child, denied an education, is not merely in jeopardy of "success," but of liberty and of life. Without an education, the likelihood that a retarded child will be institutionalized and deprived of his liberty is significantly increased. And without those self-help skills which education can bring the retarded

person, as the "accidental" death rate in institutions shows, is in jeopardy of life itself.

That was the legal argument: since the state has undertaken to provide an education to some (and indeed, to some retarded children also), it must provide an education to all.

The factual premise of the argument was equally straightforward: the fact is that all children are capable of benefiting from an education. The fact is that there is no such thing as an "uneducable and untrainable child." The fact is that, with an education, 29 out of every 30 retarded citizens are capable of achieving self-sufficiency, 25 of them in the ordinary marketplace, 4 of them in a sheltered environment. And the remaining one of every 30, with an education, is capable of achieving a significant degree of self-care. The fact is that children who are crib cases in Pennsylvania, and in most states, are *not*, in Southbury Training School, in parts of Colorado and in Scandinavia. That was the essential factual premise of the claim—to which the best of your profession as expert witnesses were prepared to testify, in as many varied and expressive statements of that fact as could be imagined.

The truth is that when many of the statutes contested in the Pennsylvania case were written that fact—the educability of all retarded children—was not so clear. Indeed, 18, 20 or 30 years ago, the fact was reasonably held to be to the contrary. But, as the Supreme Court indicated years ago in the *Carolene Products* case, "The constitutionality of a statute predicted upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist."⁸ Thus the expert witnesses took the court on a tour through the last 100 years, of the expanding realization that all retarded children are educable. Whatever facts may have misled a legislature sometime ago those facts were no longer true and to speak now of children who were uneducable and untrainable was to speak of a null class.

Pennsylvania's constitution, of course, like the constitutions of most states, carries a ringing declaration that the Commonwealth will provide an education to all of its children. Indeed, the Pennsylvania School Code itself, like that of most states, in one section speaks of "providing a proper education to all of the Commonwealth's exceptional children." But despite those declarations, and despite the effort of the chief administrators of special education in Pennsylvania, large numbers of retarded children were being denied access to schooling. (The precise number of out-of-

school children remains uncertain. Despite the School Code's requirement of an annual census, in Pennsylvania, no less than in other states, the census is either not conducted or is unreliably conducted. The best estimate based on conservative incidence data and upon the numbers of children without educational program in institutions or other facilities is that while 50,000 retarded children are in school in Pennsylvania 20,000 to 25,000 are not.)

The same School Code that said the Commonwealth shall "provide a proper program of education to all of its exceptional children," a few paragraphs later whittled its exceptions: "uneducable and untrainable children" may be excluded from schooling; "children unable to profit from further education" may be excused; the admission of a child who has "not yet achieved a mental age of five" may be postponed. (The latter provision, of course, means that those children with attributed IQ's under 35 will never be admitted to schooling, because as the calculation goes they will never attain a mental age of five.) In addition to the statutory exclusions, there existed a host of practices excluding retarded children from schooling: "not toilet trained? go away;" turning compulsory school age provisions against the child: "not eight yet? go away. 17? go away;" waiting lists: "we'd like to, but not now," and the great inventive array of devices.

Those were the circumstances that confronted the Pennsylvania Association for Retarded Children, the twelve children (children in the full range of circumstances, for by no means is exclusion limited to the profoundly or severely retarded) and their parents when they resolved to go to court. For twenty-three years the Association had attempted itself to provide schooling for the excluded (in the process they had demonstrated again and again the essential factual premise recited above), but they had for sometime realized that they could not, with their limited resources, provide schooling on the scale required and that their job had to be instead to insist that the public accept and act upon its responsibility. But still neither the legislature nor the executive had acted.

Thus, suit was filed on January 7, 1971. In April, argument was held on the question whether there was so serious and substantial a constitutional challenge to a state statute raised to require the convening of a three judge court to hear the case. In May the three judge court was convened. Intensive discovery followed in May, June and July. And the case was scheduled for a hearing on preliminary injunction on August 12 and 13. After testimony from four of the eight witnesses plaintiffs had planned to call, the defendants called a halt and announced they wished to settle the case. (As

the Court later put it in its Opinion approving the consent agreements, "The Commonwealth's willingness to settle this dispute reflected an intelligent response to overwhelming evidence against their position.")

On October 7, 1971, the Court issued a series of preliminary injunctions based on the consent agreements and binding upon all of the defendants requiring them:

(1) "To provide as soon as possible but in no event later than September 1, 1972, to every retarded person between the ages of six and twenty-one, access to a free public program of education and training appropriate to his learning capacities."

(2) "To provide as soon as possible but in no event later than September 1, 1972, wherever defendants provide a pre-school program of education and training for children aged less than six years of age, access to a free, public program of education and training appropriate to his learning capacities to every mentally retarded child of the same age."

In addition the court issued certain injunctions prohibiting the use of particular statutes and practices to deny children access to schooling and requiring that homebound instruction and tuition reimbursement be available to retarded children as it has been to others.

But words, of course, do not automatically translate into reality. Thus, the consent agreement provided and the Court ordered that the defendants in timely fashion prepare two plans: one, a plan to identify, locate and evaluate all out-of-school retarded children, and second, a plan (including the particulars of funding, program, space, recruitment and the regulations under which new programs would function) to deliver the education and training on or before September 1, 1972. To oversee the development of the plans and their implementation the Court appointed two Masters, a special educator and a lawyer familiar with retardation. Plaintiffs were to have the right to be heard on the adequacy of the plans, and in fact the Association has participated in their formulation in extended negotiations conducted under the aegis of the Masters. (Several school districts objected to the agreements and the Court's preliminary injunctions, and on May 5, 1972, the Court issued an extensive Opinion approving the agreements, making the injunctions final, and adopting the findings of fact and legal arguments discussed here.

That's zero reject education, the substantive objective of the lawsuit. Let us turn to the second function of litigation: creating a new forum. Note that the discussion thus far has been solely in terms of *access* to education. The case was carefully framed to raise

only the access question. The federal courts have indicated in several recent decisions that they will not consider questions of the quality of education. The measures and the determinants of quality of education, the courts have said, are not sufficiently clear or precise for them to make the sort of principled judgment courts are in the business of making. Yet the plaintiffs—children, parents, and Association knew that access to schooling might be to no avail if the program provided a retarded child were of low quality. Plaintiffs, unable to turn to the federal court directly for such judgments, had a choice: to rely upon their clout (now considerably increased, since the defendants had at least to provide *some* program) in bargaining with or lobbying the school authorities; or to seek to create a specialized forum where expert judgment could appropriately be brought to bear, parents and others heard, and questions of the quality of program resolved. They chose the latter.

The argument for the new forum, for a hearing on educational assignment was as follows. Garrison and Hammill had recently reported (Sept. 1971, *Journal of Exceptional Children*) the results of their study of placements in "retarded educable" classes in five county metropolitan Philadelphia. They found that at least 26% and probably as many as 68% of the children assigned to RE classes should not have been there. They had been misclassified. They should have been in regular classes or in regular classes with resource room support. That rate of misclassification is not peculiar to metropolitan Philadelphia; similar studies across the country, including Jane Mercer's in Riverside, showed a similar rate of misclassification. The consequences of misclassification are twofold: effective denial of an education and stigma.

There is hallowed legal doctrine, recently reaffirmed in cases concerned with the termination or reduction of public assistance and eviction from public housing, e.g., that before the government may withdraw from a citizen a substantial benefit it has accorded him, it must provide him with notice and the opportunity to be heard. And in the winter of 1971, the Supreme Court rendered its opinion in *Wisconsin v. Constantineau*, a case very much in point. Wisconsin had a statute authorizing the local sheriff whenever he judged someone too often public drunk to post the person's name in the town square and outside the local pubs. Mrs. Constantineau found her name posted, and didn't like it. "You can't do that without giving me a chance to fight it," she said. The district court and the Supreme Court agreed with her. In its opinion, the Supreme Court pointedly said:

"The only issue . . . here is whether the label or characterization given a person by 'posting,' though a mark of illness to some is to others such a stigma or badge of disgrace that procedural due process requires notice and an opportunity to be heard. We agree. . . that the private interest [here] is such that those requirements must be met.

"Only when the whole proceedings leading to the pinning of an unsavory label on a person are aired can oppressive results be prevented."⁹

Thus, the consent agreements provided and the Court ordered that notice and the opportunity to be heard must be extended before the educational assignment of any retarded child or any child thought to be retarded may be changed. And notice and the same opportunity to be heard must be extended automatically every two years thereafter, and, upon the request of the parent, every year. Thus before any assignment from regular class to special class, among the varieties of special class, to tuition reimbursement or homebound instruction, or vice versa notice must be given and the opportunity to be heard extended. The hearing is to be held in front of the Secretary of Education of the Commonwealth or his designee. (In fact, hearing officers, special educators mutually acceptable to the Pennsylvania Association for Retarded Children and the Department of Education, have been appointed.) The notice given the parent must indicate the recommended assignment (or the present assignment in the periodic notice after assignment) and state in detail the reasons which support it. It must state with particularity how the parent may secure the hearing; it must provide the parent with the address and telephone number of the nearest chapter of the P.A.R.C. The parent is entitled to full access to all of the child's school records before the hearing. He is entitled to an independent evaluation of the child by the Commonwealth's Office of Mental Retardation. He is entitled to be represented at the hearing by any person of his choosing—a lawyer, a friend, a member of P.A.R.C.'s educational advocacy committee. He is entitled to call and examine any person in the employ of the school district and to present any evidence or to call any witnesses of his own. The decision of the hearing officer must be based on the record and must be supported by written findings of fact. The sole criterion for decision is whether the educational program in question is the appropriate program for this particular child.

Thus a new forum—for the first time in American education, an opportunity for the parent in formal and defined fashion to hold the schools accountable for the

nature of the educational program afforded his child. And, it need hardly be said, an opportunity for questions of resource and educational practice to be raised by the professional educator, as well as by the parent, to the attention of the Commonwealth's highest educational officer. And, just by the way, an opportunity for the P.A.R.C. to offer a service (advocacy) with a very clear hard-goods result to its clients (the parents and children) and thereby to grow in strength. And finally an opportunity for parents to express themselves, to assert themselves and to have significant influence in the education of their children—but more of that in a moment.

The third function of litigation: to get the facts out front, into public discourse. . . . The media comes to court with public interest litigation, and back out through the media to the public, the legislature, indeed to teachers and to parents goes a message. Gunnar Dybwad waiting to testify cleanup is interviewed on the courthouse steps. Ignacy Goldberg, Jim Gallagher, Don Stedman, Burton Blatt testifying, and report. The central fact—the educability of all children—has a new visibility. And so does the notion that retarded citizens may have rights.

The fourth function of litigation: to express one's self and, indeed, to change one's conception of one's self. The orders of the Court, as the arguments themselves and the very presence of children and parents in court, meant that certain language that many had been using was not longer appropriate, that a new language had to be adopted, a language which reflects a different conception of persons and relationships. Two stories will illustrate the point; both occurred within the week after the Order of October 7 requiring that the twelve plaintiff children be placed in a suitable program of education and training.

In one case, the school psychologist went to the parents of one of the plaintiff children to tell them of the court order and announced: "We're going to do you a favor, we're going to give John another chance." "No," the parents said, "you're not going to do us a favor. You're going to give us what we are entitled to have."

In the second case, the school psychologist visited the house of another plaintiff child and said to the mother: "We've got an order that says we have to put your child in school. Now, we're good people, and we'll obey that order, but you should understand the facts. You remember two years ago we had Jim in a class and after two weeks we had to call you and tell you he was acting up and take him home. That class was not for him; the children in it were high trainable; they were doing things different from what Jim

needed. Well, we have that same class, and we'll put Jim in it—if you want us to. But you and I know that after two weeks we'll have to call you again and tell you he's disrupting the class and take him home, and of course we'll give you the notice and the hearing and all the rest. But what good mother would put her child through all of that?" Well, the mother said many things in response, all of which in essence said: "You're talking the wrong language, to the wrong person. It is no longer the case that the child must fit the class. Now the class must fit the child."

The language is different—and so is the reality, or so it may be. The retarded child is person, citizen, with rights and places to enforce them.

Several conclusions suggest themselves.

One, the use of this sort of approach—to the rights of the retarded, through litigation—is going to multiply.

Two, this approach depends deeply and seriously upon *professional inputs*—whether it was the expert witnesses, whether it was the AAMD, CEC, and NARC presenting themselves to the Court as amici curiae prepared to argue, elaborate, explain the facts that characterize the world of the retarded.

Three, "advocacy" can now be invoked by the retarded, not in some analogous, poetic, watered-down sense of the word but in its strict and historic meaning. The evolution of this new forum, of the due process hearing, its multiplication, may be counted upon in the other cases now pending across the country. The significance of this forum, if we have the will and the tools to use it, cannot be overstated.

Four, effective use of the new forum requires widespread, well-trained lay advocates in the retardation movement—ARC's will have to develop "education rights handbooks" (Pennsylvania has the beginnings of one) that lay out in language understandable to all how to claim a child's rights, where to go, what to say. ARC's will have to become proficient in using the hearings.

This may require a shift in funding patterns. ARC's are out of the business of delivering education now, and into the business of advocacy. H.E.W. funding will have to reflect this new role.

Five, the facts about which the experts testified—that there is an effective program of education for every child—will have to be "packaged." It's one thing for the expert to know it can be done; it's quite another for the teacher to know how, with what materials, after what diagnosis, and with what continuing evaluation. That knowledge, both of

program design and delivery, is not as widespread as it must be. Nor is knowledge of how and where to find out-of-school children widespread. It must be.

Six, H.E.W. has the power to promulgate regulations, under the Education of the Handicapped Act of 1970 and otherwise, requiring zero reject education and due process hearing opportunities as a condition of federal funding, and arguably it has the obligation to promulgate them.

EXCERPTS FROM QUESTION AND ANSWER SESSION

MR. IRVIN: You know, the "thing Tom is addressing himself to in Pennsylvania (the default on census, perhaps bad methodology for census, and the confusion in incidence data), not only will this thing have implications beyond Pennsylvania, but this particular issue to me is the central issue facing us in the education of the handicapped today. And we are no better off nationally than the State of Pennsylvania is locally.

We keep saying that of the 7 million handicapped kids, 40 percent are being served, and no one knows where the other 60 percent are.

But I think the day is going to come when we can't go up and just use statistics with OMB and with the Congress. I think it is particularly significant now because Commissioner Marland has called for commitment, a national commitment, for the education of the handicapped, that by 1980 all handicapped kids will be served, whatever "served" means, and it's pretty hard to know who you're serving or how or anything else unless you have some kind of more reliable numbers.

But the same thing is happening—I made some calls, because I am on the task force that is involved in this. I called, for example, the State of Oklahoma and asked them how many—because they indicated they were serving only about 15 percent of the estimated handicapped kids.

I said, "How many known bodies do you have who are waiting to be served?"

They said, "We'll call you back tomorrow."

So they called Tulsa and Oklahoma City. They called me back and said, "We don't have any."

At the same time then I said, "Well, how is that particular Act that we have, Title VI or Part B of the Education of the Handicapped Act? What kind of luck are you having with that?"

They said, "Man, that's the best thing we have had ever. You know, this year we got 220 more units for the handicapped."

I said,⁴ "What was the basis?"

They said, "We don't know where the kids are. Now we have got the units, we will go find the kids."

And this is the kind of thing that goes on around the country right now.

I'd say 99 percent of the States use the old Mackey figures, the 12 percent and so forth, and very few States can actually identify kids in that same sense.

I think there are some other kinds of assumptions we can go into that of the so-called 60 percent a heck of a lot of those kids are in regular classes and probably can remain there, and to me the implication when you are talking cost and so forth to Congress and the kind of training that may be needed for some of the kids in the 40 percent group is kind of overwhelming.

I am glad to see that we are beginning to get away from the lock step of the segregated special class. I mean a concept of a continuum of services is beginning to grow more and more.

MR. GULA: You know, the British in 1957 did a nose count of every child born, and they actually followed those kids. Maybe somebody here knows more about this than I do. But I think that probably would be the closest to a real head count of what has actually happened,—and we may be able to get some rural, suburban and ghetto counterparts out of that.

It's kind of second-handed. It's a shame to go overseas.

I think North Carolina did a house-to-house kind of count.

DR. HELSEL: Yes.

MR. GULA: Did they not?

DR. STEDMAN: That was the Alamance County study, but they came up with 14 percent.

MR. GULA: Prince Georges County or somebody did a door-to-door count.

DR. SOLOYANIS: Maryland.

MR. KRAUSE: The same with Riverside, California.

MR. GILHOOL: You have Riverside and New London and other studies, and all of the figures are very different.

And even if we could justify those figures, that of course wouldn't satisfy the burden here because the

burden here is to notify each of those children—to find each of them, not merely to estimate how many there are.

DR. STEDMAN: Right. There are some opposing problems there, too.

I have been involved myself, and probably people have here at least a dozen times, and with other groups in going to systems like insurance companies to ask for actuarial studies, and those are systems that can do that kind of thing, but they can't do it without a definition.

They say, "You tell us what a yellow-bellied sapsucker looks like, and we will find him for you."

Then we're up a tree.

Literally.

And that becomes part of the problem.

The other side of it is that if you do try to go the definitional route, then you almost immediately are in a psychometric slot which is running counter to a major movement in the area of labeling and effects of the use of psychometrics as far as, you know, self-fulfilling prophecies and the kind of thing Jane Mercer is involved in and the rest.

So it is really a can of worms. Tom is right, you know. And I suggest this was really probably a big jolt for you, Tom, when you got into the area and started talking to some of the so-called captains of industry in this area, that we had managed to hold out for so long and to move from \$1 million in 1960 to \$300 million in 1970 on the strength of our definition and our ability to articulate who the group was. It's not an easy one, and we have to resolve that.

MR. GILHOOL: I didn't know whether we had a case or whether we didn't, whether we were talking about something real or not.

MR. LYNCH: I had a question about this, Tom. I gather this will be considered a precedent move. Is there no mechanism that the Supreme Court can write an affirmation on this or a universal— Does it have to be fought in every jurisdiction?

MR. GILHOOL: The case was heard by a three-judge court, and the appeal from a three-judge court is directly to the United States Supreme Court, and on appeal the Court either has to hear the case or they have to affirm.

MR. GETTINGS: The broader question that Fran is getting to is what kind of precedent do you have in this case for what is happening around the rest of the country?

You have said to us now, for example, the Boston case might end up in the same kind of consent agreement. Are we being put off by—

MR. LYNCH: By consent?

MR. GETTINGS: By consent?

MR. GILHOOL: Hard question. Hard, hard question.

My clients were not anxious to settle this case from the beginning, partly for that reason. The precedential value of a decision even in a three-judge court, however, would have been doubtful. It would have been binding in that district—that is to say, the Eastern District of Pennsylvania. But it would not have been binding in any other district around the country.

If we were in the circuit court and it were affirmed there, then it would be binding in Pennsylvania, in New Jersey, in the Virgin Islands, et cetera.

The Supreme Court is binding everywhere.

So one can't say as a technical matter that it is precedent in the sense that it is binding precedent. But it is persuasive. And its persuasiveness depends upon the record, the facts as they were set out.

It depends upon what questions were argued in front of the Court.

The Court, after all, did decide that there is a serious and substantial constitutional question here.

MR. LYNCH: One of your statements also is that it depends a good deal on the court.

MR. GILHOOL: Exactly.

MR. LYNCH: I gather from your conversation that part of your success was the intelligent questions that the Court asked that you may not get in other jurisdictions.

MR. GILHOOL: Quite. And in the same sense, the clout that you have when you walk in with this document in another court depends on the identity of the judges, and it happens that Judge Adams is among the most respected of circuit court judges, so it would carry some weight.

MR. LYNCH: One of the best informed judges there is on the circuit court.

MR. GILHOOL: Yes.

DR. STEDMAN: As a footnote to that, I was impressed with the tightness and precision of some of the quickly formed summary statements made by Judge Adams and the others, Masterson and Broderick,

of a massive amount of expert testimony that was poured in in an hour or so.

There are some summary statements in the transcript that are really exquisite and ought to be preserved and used.

MR. LYNCH: Another thing that disturbs me is—fine, the kids are going to be served. Now, in northern Virginia they are breaking down a special class system and they are putting the kids back in the normal class without any provisions. How are you going to prevent that in Pennsylvania?

MR. GILHOOL: I don't know, nor am I sure that question is justifiable for the reasons I indicated earlier. Resort would be the due process hearing.

MR. LYNCH: In a community like Wilkes-Barre or Scranton, you are going to be facing that all the time.

MR. GILHOOL: Quite. That may be where that 60,000 kids are.

DR. SOLOYANIS: How retroactive will these be? How far back? Suppose the decision about a child was made 15 years ago, you know. Will the parent be able to reopen this in his local school?

And, secondly, what do you suspect parental attitude will be now on all these past judgments where, in effect, the problem is solved, the grief is over, and the case has been settled?

MR. GILHOOL: As with some of the plaintiffs, one of the plaintiffs is 17 and now at (Ellwyn), and somebody said, "You know, it's much too late for us."

The question of the effect of this on someone who was excluded 15 years ago is as yet undetermined. If that person is still less than 21, the person can claim whatever is remaining to him until he is 21.

The agreement explicitly reserves the rights of the parties to argue and to a hearing on the question of compensation. If a child is now 19, should he get two years or should he also get the five years he was denied?

If a person is now 28 and missed it altogether, shouldn't he get it starting now, year for year?

I'm very uncertain about the outcome of that decision for reasons that are probably fairly obvious. In the desegregation cases, the courts have begun to talk about compensatory education now that we are integrating to make up for deprivations from inferior schools in the past.

In the *Knight v. Board of Education* where the court in New York City ordered 400 high school

students who were expelled without a hearing restored because it was wrong to expel them without a hearing, they also directed if the children wished it, they should be provided with compensatory education for the four or five months that they missed.

On the other hand, in the criminal area, *Gideon v. Wainwright*, on right to counsel, retroactive. If you were convicted in 1934 without counsel, you can raise it now and get a new trial.

In *Miranda*, the right to be warned of your rights before you are interrogated by police and have counsel present if you want, the court said, "No, we are not going to apply that retroactively, partly because a reasonable, well-thought-out police official couldn't have seen it coming," whereas somebody really should have known as to *Gideon* and the right to have counsel at trial was so fundamental.

O.K. Now, this is kind of fundamental, but could they have expected it? And what is the cost? So that question remains to be argued.

MR. KRAUSE: Some of the other implications here I would like to note. Do you conceive this is going to have any drastic effect upon the so-called delivery of services in Pennsylvania such as the institutions themselves?

Second, how will this be able to be interpreted in the way of future legislation for the creation of additional services or, secondly for the amount of funds that are going to have to be provided or appropriated in this case?

MR. GILHOOL: As to the institutions, the children in the class include the children in the institutions. It goes directly to the institutional programs. And there was much evidence in front of the court about who is in and who is out of school in the institutions and who is in one hour a day three days a week, and so on.

Second, as to quality, as I indicated, much of it remains still to be defined.

DR. QUINN: It is quantity more than quality, isn't it?

MR. GILHOOL: That's right. Had we gone to judgment, the court would have said, "You have got to provide them an education." I'm not so sure what else they would have said, except that we would "have come back in and said, "What you are providing isn't education."

But there we get in trouble, and that is the second place where some things have to be developed before we can with confidence face courts down on all of these questions.

But in the consent agreement we discovered—indeed Fred Weintraub at CEC discovered—a provision in the Pennsylvania Code that neither DPW nor the Department of Education had ever been aware of, and that was the provision that gave the Department of Education the right, indeed the responsibility, to supervise programs in institutions.

DR. SOLOYANIS: We knew about that.

MR. GILHOOL: O.K. Your successors didn't. At least your counterpart.

MR. KRAUSE: I mean the further effect of this consent agreement in terms of the clients, the plans in Pennsylvania which have to be considered for 30 days? What will this create in terms of future legislation? Has the Pennsylvania Association of the State there determined, for instance, the additional appropriation of monies for these classes, for day care development centers?

MR. GILHOOL: I indicated earlier the absence of money is no defense if they show up in September and say, "We can't do it."

"Why can't you do it?"

"We don't have the money."

Then they are liable to contempt.

They can do one of two things. They can raise the money or they can take the money that they are spending on education and spread it out evenly, whatever that means, so that everybody gets in. O.K.?

With respect to new legislation, it's unclear. The consent agreement was drafted especially to avoid—because the court didn't want in a consent agreement posture to strike down any statute—to avoid doing that. We interpreted statutes under this constitutional threat that was lurking there that required that you read the statutes a certain way, and the statutes are indeed rather fungible. And, of course, the evidence went to those considerations that would require you to move the statute around a little bit.

MR. HORMUTH: As a further implication of this, I gathered there had been an attempt on the part of the Commonwealth to essentially say that whatever Jis program that the department of welfare is offering meets the needs of these children and therefore, you know, there is no real question, and I gather this is something that the court basically did not accept.

MR. GILHOOL: No, the question was never joined.

MR. HORMUTH: It was never joined?

MR. GILHOOL: Right. We did our best to avoid that question. When we talked about DPW programs, we talked, for example, about the 1,800 children in interim care facilities with respect to whom it is sometimes breathed on reports and elsewhere that they are receiving an educational program because the regulations that govern interim care facilities have two paragraphs that say you have got a duty with this \$11 a day to provide education.

The fact of the matter is that they are not getting any formal, structured program of education and training. We so asserted it. There was no contrary assertion.

With respect to the children in institutions, Bernice Baumgartner has been for a good many years the clearest critic on that question herself, so that one had available state self-evaluations that indicated how many kids were in programs live days a week, five and a half hours a day, and we put in front of the court the number of kids who weren't in that kind of program, kind of defined in quantitative terms again.

We did not put in front of the court the qualitative question.

The same thing with respect to day care.

So that that question is lurking here. Had it been raised, who knows?

MR. HORMUTH: I wonder, you know, what the precedents or the implications of that might be, for example, in a State like Ohio in which they have relegated responsibility for any child with an I.Q. below 50 to the welfare department.

MR. GILHOOL: In one set of their regulations Pennsylvania said, "We do that for everybody with an I.Q. under (20)," but in fact that wasn't uniformly applied, and they had another set of criteria, too, that they invoked.

MR. HORMUTH: I could see implications in terms of other kinds of programs as well which exist in a State in which one particular State department presumably has responsibility for providing a specific kind of service and then you begin to make exceptions in terms of the retarded, you know, and assign them elsewhere.

MR. GILHOOL: With Goldberg's testimony we tried to anticipate some of these questions, not with—For example, Ignacy Goldberg testified that one of the things he would look at to determine whether it is schooling, whether it is a structured, formal program of education and training, was whether there was someone there who was kind of the engineer who was

setting goals and evaluating whether they were met and laying out how you go from here to there.

And we even got him to breathe the word "certified special education teacher" once or twice on the record. That shows you where my mind was tending.

If I was forced to that question, I would have said, "Well, surely one of the things that remarks education is the presence or absence of a certified special education teacher structuring the process."

MR. GULA: I also wonder whether the role or the presence of departments of welfare and the responsibility that some of them hold for the training and education of retarded is not an accident of history.

Because, remember, number one, that State institutions including those for retarded, long preceded State departments of public welfare and, number two, with the reluctance of departments of education to have a downward extension of responsibility, the Department of Public Welfare was kind of, you know, moved into that role whether they liked it or not.

And it seems to me conceptually this should not be the travesty that ought to project itself into the future.

MR. HORMUTH: This is why I was wondering what this kind of precedent might envision for us, what this might ultimately lead to.

MR. GILHOOL: It seems to have some dynamic about it that presses in the direction of generic responsibility.

DR. QUINN: In education?

MR. GILHOOL: Yes.

DR. QUINN: Right.

MR. HORMUTH: There are implications in terms of a variety of other kinds of programs.

DR. STEDMAN- Service delivery in general.

MR. HORMUTH: Right.

Well, a simple example. We have had problems in terms of the crippled children's program, for example. A State defines conditions and eligibility, et cetera. In a number of instances if a child is admitted to an institution which is in the jurisdiction of another department, those services don't necessarily follow that child. They are no longer available.

You know, I can see the implication of some of these comments for programs of that kind.

MR. GILHOOL: Yes, you see, in some ways it seems to me that that kind of question is one that courts will be very reluctant to resolve.

MR. GULA: Yes.

MR. GILHOOL: If there are principled reasons for resolving that question or reasons that approach the principled, probably that should be resolved by HEW through regulation, through regulation going to the plans that must be submitted.

MR. GULA: Or if not by regulation, by the kind of strategy used for financing of grants, et cetera.

And the other thing is this would be really one of the most atypical states one could conceive of to have this kind of reorientation occur, because for over 100 years Pennsylvania was governed by what was called the county institutional districts, which was the vehicle that carried all the service delivery in a very impaired kind of way, and it is only within the last two or three decades that that was abolished and the State system has come to bear.

So you are up against all kinds of obstacles there which perhaps you wouldn't face in some of the more progressive kinds of states.

DR. SOLO YAMS: Tom, I'd like to comment on this division of responsibility between the department of welfare and education in Pennsylvania. Because in the '50's I used to get those school exclusions. They used to come to me, and I used to take them and put them in a file.

Every time education would speak and say, you know, "We have turned this case over to the department of welfare," I would say, "Bull," because what it really was was a device to excuse that local jurisdiction from having to spend any money on this child, and the department of welfare, had no responsibility whatsoever.

It was in the school code that it said we had the responsibility, not in ours. And there was no way you could call a parent up and say, "Your child has been excluded. We're ready to give him services." That was also a mockery. And we were quite bitter about this practice of educators in saying, you know, "We have done a positive thing," when in fact they hadn't.

For a long time also even though they had supervisory responsibility in their school code, there were other acts that were in conflict with this, and in point of fact they didn't want us. We had the children they excluded.

And we used to claim—this is a very emotional thing for me because I was in the middle for many years—that they didn't know what to do with these kids, that they didn't recognize the occupational therapist and the physical therapist and the behavior

mod and all the other people. And, in fact, we were willing to give them fiscal responsibility and were willing to meet their standards but we didn't want them in there.

Because, in fact, the Commonwealth doesn't provide anything but grants and guidelines, and so on, from all the districts, and we were also willing to go this route.

But for Title I and for some other things that gave you that count that Bernice was able to give you, you know, we wouldn't even have the facts that we have now.

Another thing. If you went the route of the special education teacher, the welfare institution would have passed. We had as many— The percentage of qualified special ed teachers in our institutions was as high as in the community—about 70 percent. What you had on us was that not all these kids were under these programs.

DR. STEDMAN: Two points. One is loaded, and I will save it until the last.

We slid very quickly over the master, and it might be worthwhile to say who he or she might be. But what is a master? What is going to be the role of this person? What is his responsibility? So when one is named, we will know what it is, and we will need some criteria for evaluation.

MR. GILHOOL: A special master is appointed under Rule 53 under the Federal Rules of Civil Procedure. A master acts in place of the court, though reporting to the court.

The master has the usual powers of the court to summon witnesses to call people, to make a record, and so on.

And he has, in addition, whatever other powers or duties the court chooses to give to him.

The closest analog is the use of a master in desegregation cases, most often used when a school district under order to formulate a plan to desegregate refuses or fails to formulate an acceptable plan. Then the court will appoint a special master. Most often in those cases to draw up the plan.

In this case the master is not appointed to draw up the plan. Rather, that responsibility rests on the defendant. The master is appointed to monitor that process, to make the original judgment about the adequacy of the plan and monitor the implementation.

He is appointed to another purpose, the most important purpose I think, and that is to *inform the process*. The court is very aware of the fact that we are dealing here with untrod territory. They were

equally aware of the fact that both of the very small bureaucracies that bear chief responsibility are over-extended, and therefore the master was there to exhort and to inform and to bring to bear on the process such resources and experience from elsewhere as he might.

MR. KAPLOW: Does the-master make decisions on the adequacy of the plan and are his decisions final?

MR. GILHOOL: His decisions are not in any sense final. They are subject to report to the court and final decision by the court. And they are subject as well to argument in front of the master by the parties and, if appropriate, argument in front of the court.

DR. STEDMAN: Now the loaded one. Do you think you could construct a successful defense for the Commonwealth?

MR. GULA: As one more point, in terms of action implication or policy that have come out of this, it seems to me the Pennsylvania Association for Retarded Children is obviously seriously handicapped by the lack of adequate data, machinery, et cetera, relative to identification of retarded individuals, especially children, whether you are looking at the ghetto, the suburbs, or the country.

With that in mind, and recognizing that this is a universal need throughout the country, would it not be important for us to recognize as an HEW group here that whether we do this individually or in some kind of a jointly funded operation— Should we not address ourselves to this as one of the high priority needs in any future financing of projects, grants, or what have you, so we do get enough of these pilot kind of identification things so that they would have transfer value from State to State, not only for purposes of court deliberation of this kind but ultimately for administration of this kind of thing?

Because your State agencies will need to really know what the head count is, and I think the process of arriving at an adequate head count will probably be an interagency kind of responsibility both on the State and on the Federal level.

So maybe there is some moment for considering the possibility of some joint funding.

MR. KRAUSE: That's true. That's why my one question about legislation. There are many State school census laws.

MR. GILHOOL: We have one. It says the county superintendent shall know the identity of every child who is exceptional in the district. He shall be evaluated early. A report shall be made. And my understanding is that virtually every State code has that provision.

But it's not carried out. And many of them use the reason, the excuse, of lack of financing.

MR. GILHOOL: Just one further word to go all the way back to the precedent question. Exactly the same case is pending in the District of Columbia, *Hobson and Hanson III*. Skelly Wright declined to sit on *Hobson and Hanson III* because it was now five years away from the period when the District of Columbia

didn't have its school board and there was an excuse for a circuit court judge to sit.

In the course of declining, he said, "It's outrageous."

There are cases under preparation of the same sort in California and New Jersey and cases under preparation in Michigan.